

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appln No.:	10/736,037)	Confirmation No. 4023
)	
Filed:	December 15, 2003)	
)	
Applicants:	Kincaid et al.)	This Second Declaration was
)	electronically filed on September 24, 2008
)	using the USPTO's EFS-Web.
Title:	Edible Spread Composition)	
	and Packaged Product)	
)	
Art Unit:	1794)	
)	
Examiner:	Carolyn A. Paden)	
)	
Attorney Docket:	1410-77005)	
)	
Customer No.:	48940)	

Mail Stop AMENDMENT
Commissioner for Patents
P. O. Box 1450
Alexandria, Virginia 22313-1450

SECOND DECLARATION OF CARRIE M. KINCAID UNDER 37 C.F.R. § 1.132

Dear Sir or Madam:

I, CARRIE M. KINCAID, pursuant to 37 C.F.R. §1.132, hereby declare and state as follows:

1. I am a co-inventor of the subject matter claimed in the above-identified application and currently work in a technology area closely related to the subject matter of the above-identified application.
2. I am employed by Kraft Foods ("Kraft") as a Senior Scientist in the Oscar Mayer Growth Department. My current responsibilities include developing formulations, managing microbial concerns, and developing processes for Kraft products globally.
3. I have over 6 years of experience in developing food products, with over 5 years

experience in Cheese and Dairy, and my educational background comprises of a B.S. in Food Science from The Ohio State University.

4. I have also previously submitted a Declaration in the present case to demonstrate that the first set of references cited by the Examiner did not provide the inventive product.

5. I have reviewed the application, the Final Office Action mailed June 25, 2008, and the primary prior art references Reed (U.S. Patent No. 2,968,628) and Villagran (U.S. Patent No. 5,490,999) cited by the Examiner. In addition, I am very familiar with the technology involved in the application in general, and the state of the art in that technology.

6. The presently claimed invention is directed to an edible spread composition containing peanut butter and oil and packaged in a pressurized container without experiencing unacceptable separation of oil from the peanut butter upon storage. The edible spread composition comprises about 10-45% peanut butter, about 0.5-10% oil, about 10-60% water, about 1 to about 20% dairy protein concentrate and enough emulsifier to prevent the oil from separating from the mixture while stored under positive pressure in the container and having a density greater than about 1.05 g/ml when discharged from the pressurized container.

7. I believe that the Villagran patent covers the formulation of JIF[®] brand reduced fat peanut butter since the formulation of JIF[®] reduced fat is similar to the formulation disclosed in the Villagran patent. Moreover, JIF[®] brand peanut butter is marketed by Procter & Gamble, the assignee of the Villagran patent. A comparison of the ingredient label of the reduced fat JIF[®] to Example 1 listed in the Villagran patent was made, which further indicated to me that the reduced fat JIF[®] was most likely the same or very similar peanut spread in the Villagran patent (*See* attachment, page 3). The comparison was made using the ingredient label on a jar of JIF[®] reduced fat peanut butter. The ingredients on the label, although not listed with amounts, are listed in descending order. Therefore, the ingredient used in the highest amount or percentage is listed first and so on. Accordingly, the ingredients listed in the Villagran patent at Example 1 were rearranged in my table at page 3 of the Second Attachment in descending order and the similar ingredients on the JIF[®] reduced fat peanut butter were listed alongside it and I found that their positions (*i.e.*, amounts) matched up, indicating that the amounts used in the JIF[®] reduced fat peanut butter were highly likely to be the same as disclosed in the Villagran patent at Example 1. Thus, it is my belief that the nut spread of the Villagran patent is essentially the same, or very similar, to the reduced fat JIF[®] peanut butter.

8. In the comparison between the JIF® reduced fat peanut butter label and the Villagran patent example 1 ingredients, there are a few ingredients that may initially appear not to correlate to each other; however, as will be explained herein, they actually do correlate quite well. For example, the sugar listed under the JIF® reduced fat peanut butter column is listed alone; it is in the same ingredient position as the molasses, sugar, and salt of the Villagran patent. If the molasses and salt from the JIF® reduced fat recipe were combined with the sugar, all three would then fall in the same line position as in the Villagran patent ingredient list. Therefore, these ingredients combined should also have the same amounts as in the patent list. Additionally, under the JIF® reduced fat peanut butter column, hydrogenated vegetable oil (rapeseed and soybean) is listed in the same position as CBC stabilizer and emulsifier from the Villagran patent column; however, the Villagran patent at column 3, line 65 to column 4, line 18, indicates that the stabilizer may be a combination of rapeseed and soybean oils and that the emulsifier can be mono- and di-glycerides. Thus, if these ingredients were also combined they would similarly fall on the same line position as the Villagran patent stabilizer and emulsifier ingredients. Likewise, these ingredients also have the same amounts as in the Villagran patent Example 1.

9. I conducted experiments utilizing the ingredients set out in Reed and Villagran, alone and combined, and then packaging in a pressurized can as per the claimed invention. I also made a sample utilizing the method and ingredients as set out in our patent application for peanut butter in the independent claims 1, 12 and 14. The Reed and Villagran formulas were made to contain about 88.9% peanut butter and 11.1% peanut oil, as per the equalized ratios in Reed¹, as well as a sample containing 100% JIF® reduced fat peanut butter being substituted for the Villagran formula. The samples were then all placed in cans under positive pressure (about 100 psi). These samples were compared to our inventive peanut butter spread composition containing about 40% peanut butter and similarly placed in a can under positive pressure. All of the canned samples were then stored for at least 21 days at room temperature. The ingredients and amounts used, as well as the results obtained, are provided in the following attachment to the declaration: The Exhibits in this attachment are hereby incorporated by reference.

¹ Reed adds its propellant directly to the peanut butter composition. Our pressurized cans do not. Therefore, the Reed formulation was adjusted for removing the propellant from its formulation. Therefore, 88.9% peanut butter and 11.1% peanut oil were used in order to keep the ratios constant.

10. A 40% peanut butter sample comprising our formulation was tested and shows that this level of peanut butter was stable and successful. Accordingly, lower amounts of peanut butter would also show successful results since it is essentially easier to make a lower amount peanut butter sample.

11. The Reed samples (*see* attachment, Experiment # 1) were prepared using the ingredients as outlined in Example 8 of the Reed patent with the adjustments in amounts previously noted in footnote 1. Reed only discloses using homogenized peanut butter, peanut oil, and the propellants octafluorocyclobutane and isobutane (*i.e.*, aerosol propellants); the propellants in Reed were not included in the product makeup since we use a separate pressurized air chamber where the propellant does not interact with the product as already discussed above. Therefore, the makeup of Experiment #1 included peanut oil in the amount of about 11.1% and peanut butter at about 88.9%. The Reed reference only states that homogenized peanut butter was used, therefore, a generic peanut butter spread was used in this example. The resulting composition was stored under positive pressure in an aerosol can as used in the claimed invention.

12. Two variations of the Villagran samples (*see* attachment, Experiment #2 and #3) were prepared using reduced fat JIF[®] peanut butter, as explained above at paragraphs 7 and 8. Experiment #2 was prepared to resemble the peanut spread disclosed in the Villagran reference and therefore included 100% reduced fat JIF[®] peanut butter, as we believe that the peanut spread disclosed in Villagran is the commercial form of reduced fat JIF[®] found on the market. The reduced fat JIF[®] peanut butter was stored under pressure in our aerosol can. Experiment #3 was made using the peanut spread of Villagran (*i.e.*, reduced fat JIF[®]) as the homogenized peanut butter in Reed and further combined with peanut oil. Therefore, about 88.9% reduced fat JIF[®] was combined with 11.1% peanut oil and subsequently stored under pressure in an aerosol can as in the claimed invention.

13. Our samples (*see* attachment, Experiment #4) were prepared as outlined in Example 1 of our specification except that sodium alginate, titanium dioxide slurry, polysorbate 60, caramel color, and peanut flavor were not utilized. The edible oil was approximately 3%, water was about 40%, milk protein concentrate was used at about 10%, whey protein concentrate was at about 7.28%, emulsifier (*i.e.*, panodan) was about 0.2%, and the peanut butter was used at about 40%; all within our claimed ranges (*i.e.*, 0.5-10% edible oil, 10-60% water, 1 to 20% dairy protein, and 10-45%

peanut butter). The peanut butter component used for this example was also the generic peanut butter used in Experiment #1. The method in Example 1 of our specification was followed in preparing these experimental samples.

14. When performing the tests and observing the results, a sample was viewed as having a passing result if the following criteria was met: (1) the dispensed product closely resembled a traditional peanut butter product; (2) there was no oil separation upon discharge from the pressurized can; and (3) there was no oil or product leaking out of the can nozzle.

15. The results of the Reed samples showed that all of the dispensed peanut butter samples were not stable and oil separated and leaked out of the can. After 8 days of storage, the peanut butter was already leaking out of the can and formed a pool of oil that separated in the top of the nozzle (*see* attachment, page 2). Such leakage was noticed over the entire 21 days of storage with increased leakage over time. Furthermore, upon dispensing of the product from the can after 21 days, a large amount of oil was dispensed first, before the product. The remaining product dispensed was very oily and shiny.

16. The results of the Villagran samples made according to Experiment #2 showed that the samples were not stable in the can. Peanut butter was leaking from the nozzle and a large amount of oil separation occurred, as was evident by the pools of oil that formed in the nozzle as well as on the surface the can was resting on. After 8 days of storage, the peanut butter was seen leaking from the can and a large pool of oil had formed in the nozzle with oil dripping down the sides of the can, which left a ring on the plate that the can was resting on. (*See* Attachment, page 5). Such leakage was noticed over the entire 21 days of storage with increased leakage over time. Furthermore, upon dispensing of the product from the can after 21 days, a large amount of oil was dispensed first, before the product. The remaining product dispensed was very oily and shiny.

17. The results of the Villagran samples according to Experiment #3 exhibited similar results as the samples of Experiment #2. After 8 days, peanut butter was observed leaking out of the nozzle and oil had separated and formed a large pool of oil in the nozzle as well as having overflowed and formed a large puddle of oil on the support surface beneath the can. (*See* Attachment, page 7). Similarly, over the entire 21 days leakage was noticed, with increased leakage over time. Furthermore, upon dispensing of the product from the can after 21 days, a large amount of oil was dispensed first, before the product. The remaining product dispensed was very oily and

shiny.

18. In addition, by calculating the amount of water present from the components given in the Villagran Patent, Example 1, the highest moisture that could be present is only about 3.5%; whereas the moisture in our claimed invention is about 10 to about 60% and, in our Experiment #4, described herein, was about 38 to about 41%. Furthermore, the fat level in the Villagran Patent, Example 1, is in the range of about 25 to about 35% compared to the fat level in our claimed invention of about 18 to about 25%. Both of our ranges of fat and water are outside of Villagran and when further compared to the Villagran Patent Example provide a nutritional and economic benefit.

19. In comparison, the Inventive formula at 40% peanut butter was very stable, with no leakage and no oil separation visible at any of days 8, 14 and 21. (See attachment, Pages 9-11). The Inventive sample was the only one of all the experimental samples that when it was dispensed from the can after 21 days it did not first dispense oil and did not dispense an oily or shiny product. The Inventive sample was the only sample that did not have leakage of peanut butter² and oil from the can upon storage and had no oil separation.

20. Therefore, every sample of the Reed and Villagran peanut butter exhibited leakage and/or clear oil separation. Samples exhibiting leakage of peanut butter and oil and/or oil separation were considered as failures during the development of our invention. Overall, the Reed and Villagran samples were less stable than the Inventive sample and were unacceptable in the final consistency of the dispensed product as far as consumer acceptance.

21. Traditionally, peanut butter is a much harder product to keep stable. We believe that we have found a unique combination of peanut butter, oil and other components to deliver a texture and appearance that is very similar to commercial peanut butter, as well as reducing oil separation of the product while stored under pressure, which is an important factor to being able to market such a product to consumers. The results proved that the Reed and Villagran peanut butter samples were not stable, were not resistant to oil separation when stored in pressurized containers and they did not clearly resemble a traditional, or commercial, peanut butter product when dispensed.

22. In view of the foregoing, one of ordinary skill in the art would reasonably expect that

² Peanut butter did not leak out of the can on its own. Although some peanut butter was visible in the nozzle, it was normal peanut butter that remained in the nozzle post-dispensing and not because of leakage or instability problems. Leakage is determined by the product being present in the nozzle on its own, without first having been dispensed.

following the steps and ingredients disclosed in Reed and/or Villagran would result in an unacceptable edible spread composition peanut butter product. This is also supported by the test results presented above, at paragraph nos. 15-19, which clearly show that the Reed and Villagran products are inferior products and do not function as, nor provide, an acceptable peanut butter product as the Inventive samples.

The undersigned, being warned that willful false statements and the like are punishable by fine or imprisonment, or both (18 U.S.C. §1001) and may jeopardize the validity of the application or any patent issuing thereon, hereby declares that the above statements made of my own knowledge are true and that all statements made on information and belief are believed to be true.

Date: 9/24/08


Carrie M. Kincaid

ATTACHMENT TO SECOND
DECLARATION OF CARRIE M.

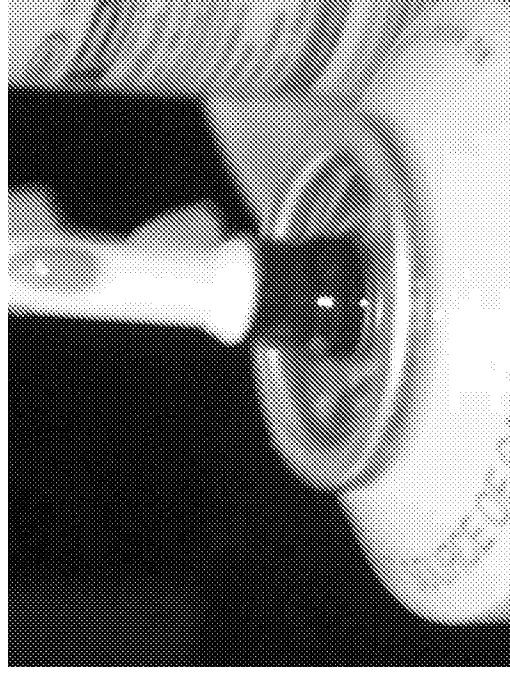
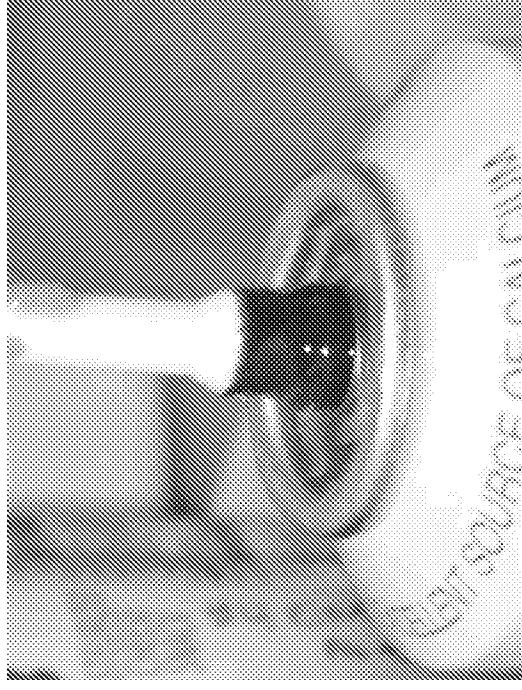
KINCAID

Application No. 10/736,037
Attorney Docket: 1410-77005

Experiment 1: Reed Patent Formulation

Ingredient	Amount
Peanut Butter	88.9%
Peanut Oil	11.1%

EXPERIMENT 1: 8 Days



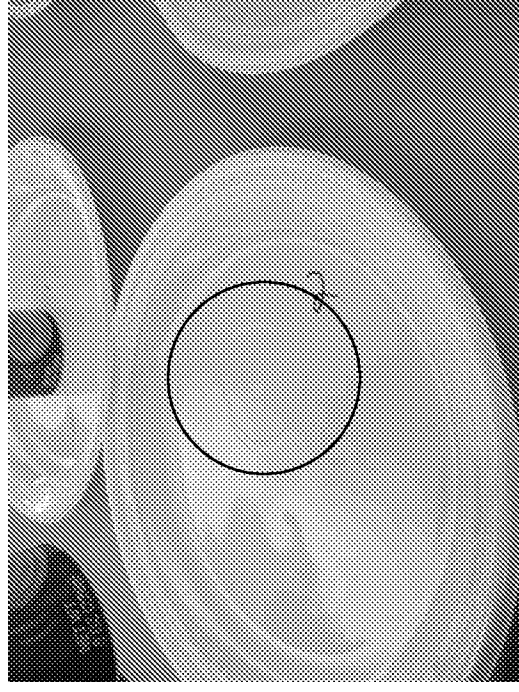
Comparison of Villagran Patent Formulation to Jif® Brand Reduced Fat Peanut Butter

Jif® Reduced Fat Peanut Butter ingredients (in descending order of prevalence)	Villagran patent (in descending order of prevalence)
Peanuts	Peanuts
Corn syrup solids	Corn syrup solids
Sugar	Molasses, sugar, salt (7.8% total)
Soy Protein	Soy protein isolate
Hydrogenated vegetable oils (rapeseed and soybean)	CBC stabilizer (can be rapeseed/soybean) and emulsifier
Salt	
Mono and diglycerides (Emulsifiers)	
Molasses	
Niacinamide	Vitamins/Minerals
Folic acid	Vitamins/Minerals
Pyridoxine hydrochloride	Vitamins/Minerals
Magnesium oxide	Vitamins/Minerals
Zinc oxide	Vitamins/Minerals
Ferric orthophosphate	Vitamins/Minerals
Copper sulfate	Vitamins/Minerals

Experiment 2: Villagran Patent Formulation

Ingredient	Amount
JIF® Reduced Fat Peanut Butter	100%

EXPERIMENT 2: 8 days



Application No.
10/736,037

Experiment 3: Villagran-Reed Patent Formulation

Ingredient	Amount
Jif® Reduced Fat Peanut Butter	88.9%
Peanut Oil	11.1%

EXPERIMENT 3: 8 days



EXPERIMENT 4: Inventive Product

Ingredient	Amount
Peanut Butter	40%
Water	39.56%
Milk Protein Concentrate	9.96%
Whey Protein Concentrate	7.28%
Peanut Oil	3%
Emulsifier	0.2%

EXPERIMENT 4: 8 days



EXPERIMENT 4: 14 days



EXPERIMENT 4: 21 days

